JAN 8 2001 (4)

No. 00-121

Supreme Court, U.S.
FILED
JAN 8 2001
CLERK

IN THE
Supreme Court of the United States

GEORGE DUNCAN, *Petitioner*,

v.

SHERMAN WALKER, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF MASSACHUSETTS, ALABAMA, DELAWARE, HAWAII, IOWA, MARYLAND, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, OHIO, PENNSYLVANIA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, WASHINGTON, AND WEST VIRGINIA IN SUPPORT OF THE PETITIONER

THOMAS F. REILLY
Attorney General of Massachusetts

CATHERINE E. SULLIVAN*
Assistant Attorney General
**Counsel of Record*
WILLIAM J. MEADE
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts, 02108
(617) 727-2200

Counsel for Amici States

41 pp

BILL PRYOR
Attorney General
State of Alabama

M. JANE BRADY
Attorney General
State of Delaware

EARL A IZAI
Attorney General
State of Hawaii

THOMAS J. MILLER
Attorney General
State of Iowa

J. JOSEPH CURRAN, Jr.
Attorney General
State of Maryland

MICHAEL C. MOORE
Attorney General
State of Mississippi

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri

MIKE McGRATH
Attorney General
State of Montana

DON STENBERG
Attorney General
State of Nebraska

FRANKIE SUE DEL PAPA
Attorney General
State of Nevada

BETTY D. MONTGOMERY
Attorney General
State of Ohio

D. MICHAEL FISHER
Attorney General
Commonwealth of Pennsylvania

MARK BARNETT
Attorney General
State of South Dakota

PAUL G. SUMMERS
Attorney General and Reporter
State of Tennessee

MARK L. SHURTLEFF
Attorney General
State of Utah

MARK L. EARLEY
Attorney General
Commonwealth of Virginia

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

DARREL V. McGRAW, Jr.
Attorney General
State of West Virginia

Question Presented

Whether a prior federal habeas corpus petition is an "application for State post-conviction or other collateral review" within the meaning of 28 U.S.C. § 2244(d)(2), which provides that the one-year statute of limitations for federal habeas corpus petitions set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) is tolled during the pendency of such an application.

Table of Contents

Page

Table of Authorities iv

Statement of *Amici* Interest 1

Summary of Argument 3

Argument 5

I. BY ITS PLAIN TERMS, § 2244(d)(2) REFERS ONLY TO APPLICATIONS FOR *STATE* REVIEW 6

II. CONSTRUING § 2244(d)(2) AS LIMITED TO STATE PROCEEDINGS IS CONSISTENT WITH THE STATUTE AS A WHOLE 11

III. LIMITING TOLLING TO TIMES WHEN STATE PROCEEDINGS ARE PENDING FURTHERS THE GOALS OF AEDPA, AS SHOWN BY THE STATUTE ITSELF AS WELL AS ITS LEGISLATIVE HISTORY 13

IV. THE EXISTENCE OF A WIDE VARIETY OF COLLATERAL STATE PROCEEDINGS GIVES MEANING TO CONGRESS'S PHRASE "STATE POST-CONVICTION OR OTHER COLLATERAL REVIEW" 17

Table of Contents, continued

Page

V. IF THE COURT REACHES THE ISSUE, IT SHOULD HOLD THAT AEDPA'S STATUTE OF LIMITATIONS IS NOT SUBJECT TO EQUITABLE TOLLING 21

VI. SIMILARLY, IF THE COURT REACHES THE ISSUE, IT SHOULD HOLD THAT FEDERAL HABEAS PETITIONS MAY NOT BE STAYED PENDING EXHAUSTION IN STATE COURT 25

Conclusion 27

Table of Authorities

Page

Cases

Averett, petitioner,
404 Mass. 28, 533 N.E.2d 1023 (1989) 19

Babcock v. Duncan,
1997 WL 724450 (N.D.Cal. 1997) 9

Barrett v. Yearwood,
63 F.Supp.2d 1245 (E.D.Cal. 1999) 9

Brogan v. United States,
522 U.S. 398 (1998) 13

Burnett v. New York Cent. R.R. Co.,
380 U.S. 424 (1965) 23

Calderon v. United States District Court,
144 F.3d 618 (9th Cir. 1998) 26

Calderon v. United States District Court (Beeler),
128 F.3d 1283 (9th Cir. 1997), *cert. denied,*
522 U.S. 1061 (1998) 24

Calderon v. United States District Court (Kelly),
163 F.3d 530 (9th Cir. 1998), *cert. denied,*
119 S.Ct. 1377 (1999) 24

Carmichael v. White,
163 F.3d 1044 (8th Cir. 1998) 25, 26

Coates v. Byrd,
211 F.3d 1225 (11th Cir. 2000) 8

Table of Authorities, continued

Page

Cases

Custis v. United States,
511 U.S. 485 (1994) 14

Davis v. Cambra,
1998 WL 738003 (N.D.Cal. 1998) 9

Davis v. Johnson,
158 F.3d 806, (5th Cir. 1998), *cert. denied,*
119 S.Ct. 1474 (1999) 24

Dickerson v. Latessa,
872 F.2d 1116 (1st Cir. 1989) 19

Duncan v. Henry,
513 U.S. 364 (1995) 15

Ex parte Royall,
117 U.S. 241 (1886) 10

Felker v. Turpin,
518 U.S. 651 (1996) 22

Fisher v. Johnson,
174 F.3d 710 (5th Cir. 1999) 22

Table of Authorities, continued

Page

Cases

Giles v. United States,
6 F.Supp.2d 648 (E.D. Mich. 1998), *aff'd*, 2000 WL 1720730 (Nov. 8, 2000) 22

Grooms v. Johnson,
208 F.3d 488 (5th Cir. 1999) 8

Hardin v. Straub,
490 U.S. 536 (1989) 10

Harris v. Hutchinson,
209 F.3d 325 (4th Cir. 2000) 24

Harrison v. Galaza,
1999 WL 58594 (N.D.Cal. 1999) 9

Irwin v. Department of Veterans Affairs,
498 U.S. 89 (1990) 21

Jimenez v. Rice,
222 F.3d 1210 (9th Cir. 2000) ..... 8, 10 ,12, 15

Jones v. Morton,
195 F.3d 153 (3rd Cir. 1999) 15

Kethley v. Berge,
14 F.Supp.2d 1077 (E.D. Wis. 1998) 9

Lindh v. Murphy,
521 U.S. 320 (1997) 12

Table of Authorities, continued

Page

Cases

Martin v. Hadix,
527 U.S. 343 (1999) 13

McCarthy v. Bronson,
500 U.S. 136 (1991) 7

Miller v. Marr,
141 F.3d 976 (10th Cir.), *cert. denied,*
525 U.S. 891 (1998) 24

Miller v. New Jersey State Dept. of Corrections,
145 F.3d 616 (3d Cir. 1998) 24

Moore v. United States,
173 F.3d 1131 (8th Cir. 1999) 24

Ott v. Johnson,
192 F.3d 510 (5th Cir. 1999), *cert. denied,*
120 S.Ct. 1834 (2000) 8

Pennsylvania v. Finley,
481 U.S. 551 (1987) 18

Phoenix v. Matesanz,
***189 F.3d 23* (1st Cir. 1999) 19**

Ratzlaf v. United States,
510 U.S. 135 (1994) 10

Page

Cases

Rhine v. Boone,
182 F.3d 1153 (10th Cir. 1999), *cert. denied*,
120 S.Ct. 808 (2000) 8

Rose v. Lundy,
455 U.S. 509 (1982) 3, 4, 5, 14, 15, 25, 26

Rupert v. Johnson,
83 F.Supp.2d 801 (W.D. Texas 1998) 8

Russello v. United States,
464 U.S. 16 (1983) 12

Sandvik v. United States,
177 F.3d 1269 (11th Cir. 1999) 24

Smith v. McGinnis,
208 F.3d 13 (2d Cir. 2000), *cert. denied*,
121 S.Ct. 104 (2000) 24

Sperling v. White,
30 F.Supp.2d 1246
(C.D. Cal. 1998) 7, 8, 13, 15, 22

Sterling v. Scott,
57 F.3d 451 (5th Cir. 1995), *cert. denied*,
516 U.S. 715 (1996) 26

Table of Authorities, continued

Page

Cases

***Stewart, petitoner*,**
411 Mass. 566, 583 N.E.2d 854 (1992) 19

***Taliani v. Chrans*,**
189 F.3d 597 (7th Cir. 1999) 24

***United Savings Ass'n v. Timbers of Inwood Forest Associates, Ltd.*,**
484 U.S. 365 (1988) 13

***United States v. Addonizio*,**
442 U.S. 178 (1979) 14

***United States v. Beggerly*,**
524 U.S. 38 (1998) 21, 22, 23, 24, 25

***United States v. Brockamp*,**
519 U.S. 347 (1997) 21, 23, 24, 25

***United States v. Cicero*,**
214 F.3d 199 (D.C. Cir. 2000) 24

***United States v. Locke*,**
471 U.S. 84 (1985) 21

***United States v. Marcello*,**
212 F.3d 1005 (7th Cir. 2000), *cert. denied*,
121 S.Ct. 188 (2000) 24

Page

Cases

United States v. Reccko,
151 F.3d 29 (1st Cir. 1998) 23

United States v. Wells,
519 U.S. 482 (1997) 24

Victor v. Hopkins,
90 F.3d 276 (8th Cir. 1996), *cert. denied*,
519 U.S. 1153 (1997) 26

Vincze v. Hickman,
1999 WL 68330 (E.D.Cal. 1999) 9

Walker v. Artuz,
208 F.3d 357 (2d Cir. 2000) 5, 17

Williams v. Taylor,
120 S.Ct. 1495 (2000) 10, 18, 22

Wilwording v. Swenson,
404 U.S. 249 (1971) 10

Statutes, Regulations, and Court Rules

Antiterrorism and Effective Death Penalty Act
(AEDPA) of 1996 ..... passim

Title 28 U.S.C. § 2243 16

Table of Authorities, continued

Page

Statutes, Regulations, and Court Rules

Title 28 U.S.C. § 2244(d) ..... passim

Title 28 U.S.C. § 2254 ..... 11, 16

Title 28 U.S.C. § 2255 22

Title 28 U.S.C. § 2261(e) 12

Title 28 U.S.C. § 2264(a)(3) 12

Fed. R. Civ. P. 6(a) 24

Rule 4, Rules Governing Section 2254 Cases in the United States District Courts (2000) 16

Mass. Gen. Laws ch. 278, § 33E 19

Other Authorities

H.R. Conf. Rep. No. 104-518, reprinted in 1996 U.S.C.C.A.N. 944 13,22

141 Cong. Rec. §7803-01 (June 7, 1995) 17

141 Cong. Rec. §7825-26 (June 7, 1995) 17

Page

Other Authorities

Fallon, Meltzer, Shapiro, Hart & Wechsler, *The Federal Courts and the Federal System*, (Supp. 1999) 9

James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* (1998 & Supp. 1999) 9

Lawrence Yackle, *A Primer on the New Habeas Corpus Statute*, 44 Buffalo L. Rev 381 (1996) 9

Lawrence Yackle, *Post-Conviction Remedies* §13 (1981 & Supp. 2000) 18

No. 00-121

IN THE
Supreme Court of the United States

GEORGE DUNCAN, *Petitioner*,

v.

SHERMAN WALKER, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF MASSACHUSETTS, DELAWARE, HAWAII, IOWA, MARYLAND, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, OHIO, PENNSYLVANIA, SOUTH DAKOTA, TENNESSEE, UTAH, VIRGINIA, WASHINGTON, AND WEST VIRGINIA IN SUPPORT OF THE PETITIONER

Statement of *Amici* Interest

The Commonwealth of Massachusetts, together with the other *amici* states, join the State of New York in urging the Court to reverse the judgment of the Court of Appeals for the Second Circuit and hold that, under 28 U.S.C. § 2244(d)(2), the statute of limitations for federal habeas corpus petitions filed by state prisoners is not tolled during the pendency of a prior federal habeas corpus petition.

The central reason that the Court should reject the lower court's interpretation of the tolling provision of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which

provides that the one-year statute of limitations is suspended during the pendency of a "properly-filed application for State post-conviction or other collateral review," is simply that the words of the statute do not provide for tolling during prior federal habeas review. It stretches both grammar and logic to pluck the words "other collateral" from the phrase "State post-conviction or other collateral review," declare that they are not modified by the word "State," and conclude that Congress therefore must have intended silently to refer to *federal* collateral review. The words of the statute demonstrate that Congress provided for tolling only during the pendency of *state* review proceedings, which, unlike prior federal proceedings, advance the case towards finality by exhausting state court remedies and serve the further purpose of comity by affording state courts the first opportunity to consider prisoners' federal claims.

The *amici* states have an interest in an interpretation of the tolling provision that does not promote the filing of unexhausted federal habeas corpus petitions. The statutory scheme under AEDPA encourages prisoners promptly to begin the exhaustion process in state court, and it provides an incentive for speedy state court filing by allowing tolling of the statute of limitations during the time that a properly-filed state proceeding is pending. To read into the statute a similar provision for tolling during prior *federal* habeas corpus petitions would provide an incentive for prisoners to do exactly the opposite: file first in federal court, regardless of whether their claims have been exhausted, and delay state court filing until receiving a ruling from the federal court. The incentive for prompt state court filing would be removed, and the prisoner could simply mark time in federal court, knowing that, if the court found his claims unexhausted, he still would be able to commence a state court exhaustion process. Such a scheme promotes unnecessary federal habeas corpus litigation, requires expenditure of state resources to defend duplicative habeas petitions, prolongs the exhaustion process, and conflicts with the

Court's teaching in *Rose v. Lundy*, 455 U.S. 509, 520 (1982), requiring prisoners to evaluate their claims for exhaustion *before* bringing them to federal court.

Summary of Argument

I. The plain words of 28 U.S.C. § 2244(d)(2), as amended by AEDPA, the tolling provision of AEDPA's statute of limitations, refer only to applications for "State" collateral review. Not only does the phrase "application for State post-conviction or other collateral review" contain no reference to federal habeas corpus petitions, but the positioning of the words "post-conviction or other collateral" between the adjective "State" and the noun it modifies, "review," makes this the only natural reading of the phrase. The reasoning of the court of appeals, that a silent reference to "federal" collateral review must be read into the section because the phrase "other collateral" review otherwise would be meaningless, is based on the incorrect assumption that Congress could not have used broad language to ensure that the great variety of state collateral proceedings were included in the tolling provision. Moreover, the lower court's reading is inconsistent with the entire section, adopting a one-year statute of limitations subject only to limited tolling during proceedings that promote exhaustion and advance the case towards finality. By broadening the circumstances in which tolling is permitted, the lower court's interpretation would foster delay and piecemeal litigation, a result contrary to the statutory scheme.

II. Reading § 2244(d)(2) in accordance with its plain meaning to apply only to state proceedings is also consistent with the statute as a whole. The amendments enacted by AEDPA, including the one-year statute of limitations, restrictions on second or successive petitions, and a standard of review that gives greater deference to state-court decisions, reflect the goals of streamlining and accelerating the habeas review process, while

recognizing interests of comity. To toll the statute of limitations during *state* review proceedings furthers these goals, as it encourages petitioners to begin the state court exhaustion process promptly and hastens the final resolution of the case. On the other hand, to read into the statute a tolling provision for *federal* review proceedings would have the opposite result: it would encourage petitioners to delay commencement of the state exhaustion process and instead to file unexhausted petitions in federal court. In addition, Congress explicitly used the word "Federal" on several occasions in AEDPA to refer to federal proceedings, indicating that it is unlikely Congress would have intended a silent reference to federal habeas corpus in this instance.

III. The purposes of AEDPA, as shown by the statute itself as well as by its legislative history, strongly support reliance on the plain meaning of § 2244(d)(2). There can be no question that a central goal of the statute, as amended by AEDPA, is to expedite federal habeas corpus review. The delay and piecemeal litigation that would be encouraged by allowing tolling for prior federal habeas corpus petitions is entirely contrary to this statutory purpose. Moreover, to encourage filing of unexhausted claims in federal court contravenes the holding of *Rose v. Lundy*, 455 U.S. 509, 520 (1982), which advises petitioners *not* to bring claims to federal court until they are sure they have complied with the exhaustion requirement.

IV. The existence of a wide variety of state review proceedings gives meaning to Congress's phrase, "State post-conviction or other collateral review." Thus, the lower court's assumption that Congress could not have intended these words to refer only to State proceedings is erroneous. The terminology given to state post-conviction proceedings varies from state to state, and some are expressly labeled "post-conviction review" petitions. The older forms of review, including habeas corpus

and coram nobis, may not be considered to fall into this category based on their nomenclature. And certainly, collateral proceedings reviewing non-criminal forms of detention, such as civil commitments, could not be termed "post-conviction."

V. If the Court reaches the issue, it should hold that equitable tolling does not apply to AEDPA's statute of limitations. Because the statute provides explicitly for tolling during State review proceedings, and where it also includes equitable considerations in defining the events that trigger the commencement of the statute of limitations, it is plain that Congress did not intend to permit additional factors, not among those specified in the statute, to toll the limitations period.

VI. If the Court reaches the issue, it also should hold that a district court may not stay a federal habeas corpus petition while the petitioner returns to court to exhaust his claims. Such a procedure is contrary to the holding of *Rose v. Lundy*, 455 U.S. 509, 522 (1982) that unexhausted petitions must be dismissed and that mixed petitions may be dismissed or amended to exclude the unexhausted claims. To allow federal petitions to be stayed or held in abeyance during the exhaustion process would encourage piecemeal litigation and would contravene AEDPA's statute of limitations.

Argument

In its decision below, the court of appeals interpreted the tolling provision of the statute of limitations in the federal habeas corpus statute, 28 U.S.C. § 2244(d)(2), which tolls the one-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) during the pendency of an "application for State post-conviction or other collateral review," as applying not only to state post-conviction proceedings, but also to prior federal habeas corpus proceedings. *Walker v. Artuz*, 208

F.3d 357, 359-61 (2d Cir. 2000). The court concluded that the words "other collateral" would be meaningless unless they were interpreted to mean "federal collateral." *Id.* at 360.

The lower court's decision contravenes the plain words of §2244(d)(2), it is inconsistent with the statute as a whole and with its goals, and it ignores the wide variety of state collateral proceedings that Congress ensured would be encompassed within the tolling provision by its choice of broad, alternative descriptions.

I. BY ITS PLAIN TERMS, § 2244(d)(2) REFERS ONLY TO APPLICATIONS FOR *STATE* REVIEW.

There can be no question that the plain words of 28 U.S.C. § 2244(d)(2), as amended by AEDPA, refer only to applications for "State" collateral review. AEDPA's statute of limitations provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of —
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> >
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d) (emphasis added).

The plain language of 28 U.S.C. §2244(d)(2) cannot be read to support the court of appeals' decision. *See United States v. Wells*, 519 U.S. 482, 490 (1997) (natural reading is the first criterion in the interpretive hierarchy). "[S]tatutory language must always be read in its proper context. In ascertaining the plain meaning of a statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *McCarthy v. Bronson*, 500 U.S. 136, 139 (1991) (citations omitted), *quoted in Sperling v. White*, 30 F.Supp.2d 1246, 1250 (C.D.Cal. 1998).

Here, there is simply nothing in the plain words of the phrase, "application for State post-conviction or other collateral review," that naturally may be read to refer to federal collateral relief. The syllogism that the court of appeals used to reach this conclusion is strained at best: because there is no meaningful

difference between state "post-conviction" and state "collateral" remedies, the lower court posited, it must be assumed that Congress intended the phrase "other collateral" to be a silent reference to "federal collateral" review. *Walker*, 208 F.3d at 359-61. Not only was the lower court's premise erroneous, as described below,[1] but the court's analysis ignored the plain words of the phrase and their natural import. Where the words "post-conviction or other collateral" appear together, sandwiched between the adjective "State" and the noun that the whole phrase modifies, "review," the plain and natural reading of this phrase is that it refers to *state* review only.

Such a conclusion is consistent with the interpretation given the statute by the United States Courts of Appeals for the Third, Fifth and Ninth Circuits, each of which has held that the limitations period of 28 U.S.C. §2244(d)(1) is not tolled during the pendency of a petitioner's prior federal habeas corpus petition. *See Jones v. Morton*, 195 F.3d 153, 158-159 (3d Cir. 1999); *Grooms v. Johnson*, 208 F.3d 488, 489 (5th Cir. 1999); *Jiminez v. Rice*, 222 F.3d 1210, 1213-14 (9th Cir. 2000). This interpretation is also consistent with opinions of the United States Courts of Appeals for the Fifth, Tenth and Eleventh Circuits, which have concluded that petitions for *certiorari* to the Supreme Court do not constitute "other collateral review," as they are not petitions for "State" review, s*ee Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999), *cert. denied,* 120 S.Ct. 1834 (2000); *Rhine v. Boone*, 182 F.3d 1153, 1156 (10th Cir. 1999), *cert. denied,* 120 S.Ct. 808 (2000), *Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000); and with the opinions of most district courts that have addressed the issue.[2] The authors of these decisions all conclude

---

[1]See argument IV below.

[2]*See, e.g., Rupert v. Johnson*, 83 F.Supp.2d 801, 804 (W.D.Tex 1998) (for purposes of tolling under §2244(d)(2), federal habeas petition does not constitute "other collateral relief"); *Sperling v. White*, 30 F.Supp.2d 1246,

that the plain and natural reading of § 2244(d)(2) is that the word "State" modifies the entire phrase following it, including both "post-conviction" and "other collateral" review.[3]

A natural reading of the phrase need not ignore its logical import in the context of the entire section, which enacted a one-year time limitation, subject only to limited exceptions and tolling. No one disputes that Congress intended to -- and did --

---

1253 (C.D.Cal. 1998) (§2244(d)(2) "plainly does not toll limitations during the pendency of federal habeas petitions"); *Kethley v. Berge*, 14 F.Supp.2d 1077, 1079 (E.D.Wis.1998) (no tolling under §2244(d)(2) for time that unexhausted claims in federal habeas petition were pending in District Court); *Harrison v. Galaza*, 1999 WL 58594, at *2 (N.D.Cal. 1999) ("[t]he running of the limitation period is not tolled, as petitioner contends, for the time period during which a properly filed application for post-conviction or other collateral review is pending in federal court"); *Vincze v. Hickman*, 1999 WL 68330, at *1 (E.D.Cal. 1999) ("the court concludes that the statutory tolling provision set forth in Section 2244(d)(2) does not toll the period during the pendency of petitioner's first federal habeas petition"); *Davis v. Cambra*, 1998 WL 738003, at *2 (N.D. Cal. 1998) ("[t]he time during which a properly filed application for post-conviction or other collateral review is pending in federal court does not toll the running of the one-year statute of limitations"); *Babcock v. Duncan*, 1997 WL 724450, at *2 (N.D.Cal. 1997) ("[n]o court has found that the running of the limitations period also is tolled . . . for the time period during which a properly filed [habeas corpus petition] is pending in federal court"). *But see Barrett v. Yearwood*, 63 F.Supp.2d 1245, 1250 (E.D.Cal.1999) (the "plain meaning" of §2244(d)(2) "is that the statute of limitations is tolled during the pendency of any properly filed federal habeas corpus petition").

[3]That this is the natural reading of § 2244(d)(2) is further confirmed by the agreement of the authors of a treatise "written from the procedural perspective of prisoners," that "federal habeas corpus proceedings do not themselves toll AEDPA's statute of limitations." *See* 1 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 1.1 at 2; § 5.1b at 229-30 n.57 (3d ed. 1998 & Supp. 1999) (emphasis omitted); *accord* Fallon, Meltzer, Shapiro, Hart & Wechsler, *The Federal Courts and the Federal System* (Supp. 1999) 162; Lawrence Yackle, *A Primer on the New Habeas Corpus Statute*, 44 Buffalo L. Rev 381, 387 (1996).

toll the statute of limitations during the pendency of a properly-filed state application for collateral review. It would be surprising if even the respondent did not agree that this Congressional intent extended to the full panoply of state court vehicles for attacking the judgment of conviction or other confinement, whatever the local terminology for such relief. Stopping the clock for a broad range of state court remedies makes sense in light of the longstanding interests, recognized by habeas corpus jurisprudence and legislation, in comity and exhaustion of state court remedies. *See, e.g., Ex parte Royall*, 117 U.S. 241 (1886); *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971). Thus, the natural import of the words themselves, referring to any and all such state court remedies, is also logical in the context of the entirety of § 2244(d), imposing a one-year statute of limitations, subject to only limited exceptions and tolling. On the other hand, to read the words "other collateral" as a silent reference to "federal collateral" review is to broaden the circumstances in which tolling is permitted, and makes no sense in the context of the section itself, since "[a]pplying §2244(d)(2) to a federal petition does nothing to further Congress's intent to promote exhaustion of state relief." *Jiminez v. Rice*, 222 F.3d at 1214. Moreover, such a re-writing of the statute would foster delays in federal habeas corpus cases, a result plainly contrary to the overall statutory scheme and the purpose of the statute of limitations to accelerate the habeas corpus process. *See Hardin v. Straub*, 490 U.S. 536, 539 (1989).

Finally, a "cardinal principle of statutory construction . . . [is] to give effect, if possible, to every clause and word of the statute." *Williams v. Taylor*, 120 S.Ct. 1495, 1519 (2000). "Judges should hesitate . . . to treat statutory terms [as surplusage] in any setting." *Ratzlaf v. United States*, 510 U.S. 135, 140 (1994), *quoted in Jiminez v. Rice*, 222 F.3d at 1212-14. The lower court's interpretation of § 2244(d)(2) would do just that: it would render the word "State" superfluous. And if, contrary

to the *amici* states' argument, the word "collateral" were viewed as wholly synonymous with, and merely repetitive of, the phrase "post-conviction," the words "other collateral" would also be superfluous. The lower court's analysis is simply contrary to the plain language of the statute.

II. CONSTRUING § 2244(d)(2) AS LIMITED TO STATE PROCEEDINGS IS CONSISTENT WITH THE STATUTE AS A WHOLE.

While it is not necessary to look beyond the plain words of 28 U.S.C. § 2244(d)(2) to glean its meaning, reading the section to apply only to state proceedings is also consistent with the overall statutory scheme enacted under AEDPA.

The statute itself imposes several means to streamline and speed up federal habeas corpus review, including not only the statute of limitations contained in § 2244(d), but also limitations on second or successive petitions and a standard of review designed to give greater deference to state courts' legal conclusions and factual findings. 28 U.S.C. §§ 2244(b), 2254(d)-(e). Tolling the statute of limitations during exhaustion proceedings in state court, which serve the interests of comity as well as causing the case to progress towards finality, is wholly consistent with this statutory scheme, as it encourages prisoners promptly to begin the exhaustion process and puts the case "on track" to a final conclusion. To read into the statute a tolling provision for prior federal habeas corpus petitions, however, makes no sense at all in light of the statutory scheme. Such a provision would encourage prisoners to *delay* commencement of the state exhaustion process by filing unexhausted claims in federal court and encourage -- rather than discourage -- multiple, piecemeal collateral attacks on state convicitons and sentences via federal habeas corpus actions. Requiring the states to defend duplicative and unnecessary habeas petitions, where in general

the only result is to send the prisoner to state court to exhaust his claims, contravenes the statutory scheme to encourage prompt state filings and advance the case towards finality.

Reference to other sections of AEDPA, moreover, makes it particularly evident that Congress's omission of any reference to "federal" proceedings in § 2244(d)(2) was intentional. On numerous occasions, Congress made explicit reference to "federal" proceedings. *See* 28 U.S.C. § 2254(I), referring to ineffective assistance of counsel "during Federal or State collateral post-conviction proceedings"; § 2261(e), referring to ineffective assistance of counsel in capital cases "during State or Federal post-conviction proceedings" and to appointment of counsel "at any phase of State or Federal post-conviction proceedings"; § 2264(a)(3), referring to facts that could not have been discovered "in time to present the claim for State or Federal post-conviction review." That, in the tolling provision of § 2244(d)(2), Congress included a reference to "State" review, but made no reference at all to "federal" proceedings, indicates that it did not intend silently to include tolling for federal collateral proceedings.

This conclusion is supported by the canon of statutory construction, *expressio unius est exclusio alterius*. That is, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983); *see Jiminez v. Rice*, 222 F.3d at 1213-14; *cf. Lindh v. Murphy*, 521 U.S. 320, 330 (1997) (because Congress specifically provided that the AEDPA applies to pending capital cases, but failed to address the AEDPA's application to pending non-capital cases, the negative implication of Congress's failure was that Congress did not intend that the AEDPA apply to pending non-capital cases). Thus, even if the

word "State" in this context were deemed ambiguous, the inclusion of the word "Federal" elsewhere to refer to federal proceedings clarifies that the use of "State" alone indeed was intended to denote *only* state proceedings. *See generally United Savings Ass'n v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988). It may be inferred from the many explicit references to "Federal" proceedings in other sections of AEDPA that Congress would "have used language more obviously targeted" to include federal proceedings had it so intended. *See Martin v. Hadix*, 527 U.S. 343, 354 (1999).

Similarly, "[u]nder the principle *ejusdem generis*, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Brogan v. United States*, 522 U.S. 398, 403 n.2 (1998) (citations omitted), *quoted in Sperling v. White*, 30 F.Supp.2d at 1253 & n.9. Applying this principle, the phrase, "a properly filed application for State post-conviction or other collateral review," limits the definition of the general words "other collateral review" by the more specific words "State post-conviction" review. Thus, the words "other collateral review," read in the context of the sentence as a whole, naturally denote other *state* collateral review proceedings and should not be read to refer to an entirely new class of non-state or federal proceedings.

III. LIMITING TOLLING TO TIMES WHEN STATE PROCEEDINGS ARE PENDING FURTHERS THE GOALS OF AEDPA, AS SHOWN BY THE STATUTE ITSELF AS WELL AS ITS LEGISLATIVE HISTORY.

Both the provisions of AEDPA itself and its legislative history reveal a purpose to expedite federal habeas corpus review. *See* H.R. Conf. Rep. No. 104-518, at 11 (1996), *reprinted in* 1996

U.S.C.C.A.N. 944 (AEDPA amendments intended to "curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases," as well as to require exhaustion of state remedies and deference to state court decisions that meet the new standard); H.Rep. No. 104-23 at 29 (one purpose of AEDPA's habeas corpus reform was to "curb the lengthy delays in filing that now often occur in federal habeas corpus litigation). Moreover, the need to bring cases to finality without unnecessary delay is not limited to capital cases. Victims of crime and their families, witnesses, and the community have a need for finality and closure in criminal cases in general. *Cf. Custis v. United States*, 511 U.S. 485, 497 (1994) ("'Inroads on the concept of finality tend to undermine confidence in the integrity of our procedures' and inevitably delay and impair the orderly administration of justice.") (quoting *United States v. Addonizio*, 442 U.S. 178, 184 n.11 (1979)).

To adopt the plain meaning of § 2244(d)(2) is wholly consistent with AEDPA's purpose promptly to bring cases to finality. To limit tolling to state collateral proceedings serves the purposes of finality by stopping the habeas clock *only* for review proceedings that advance the case towards a final conclusion. Nothing in AEDPA suggests that Congress intended to delay the final resolution of a case by encouraging petitioners to go automatically or repeatedly to federal court, without first exhausting state court remedies. Yet this would be the result if tolling were permitted for prior federal habeas corpus petitions. Contrary to the holding of *Rose v. Lundy*, 455 U.S. 509, 520 (1982), in which the Court directed petitioners to "be sure [they] have taken each [claim] to state court" before bringing it to federal court, *id.* at 520, providing for tolling during prior federal habeas petitions would encourage petitioners to make federal court their first stop. There would be no need for a petitioner to evaluate his or her claims for exhaustion prior to filing in federal court, since the clock would stop as soon as the petition was filed,

exhausted or not. From the petitioner's point of view, it would be foolish *not* to bring unexhausted claims to federal court first, in the hope that the defect would go unnoticed and with the assurance that, in any event, nothing would be lost. Moreover, if the petitioner wished to buy additional time prior to filing in state court, he could simply file a series of unexhausted petitions in federal court, tolling the statute indefinitely. *See Jones v. Morton*, 195 F.3d at 159; *Sperling v. White*, 30 F.Supp.2d at 1251.

Such a scenario is wholly contrary to the interests of finality and expedition of federal habeas corpus review. Litigation of unexhausted petitions adds another step in the process of collateral review that delays, rather than expedites, the progress of the case towards finality. Defense of unexhausted petitions also requires the expenditure of state resources. In states such as Massachusetts, where the local district attorneys handle all state court appeals and post-conviction motions filed in state court, the attorney general must request the file from the local district attorney, often requiring retrieval from a storage facility, and then review it for the first time. When the petitioner has failed to present his claims to the state courts, not only have the state courts been deprived of the first opportunity to rule on the issue, but the local prosecutor has not reviewed the claim, and coordination of effort is required between the state and local prosecutors in order to ensure that all relevant facts and considerations are marshaled. It is far preferable, as Congress evidently recognized, to create a strong incentive for petitioners to go immediately to state court to exhaust their claims, where the local authorities and courts most familiar with the matter may consider it in the first instance. *See Duncan v. Henry*, 513 U.S. 364, 365-366 (1995); *Rose v. Lundy*, 455 U.S. 509, 518 (1982); *Jiminez v. Rice*, 222 F.3d at 1214. When this has occurred, the process of federal habeas review of the state court decision, within the one-year limitations period, is not only more efficient, but it is informed by the earlier state court review process. Most

importantly, where petitioners go directly to state court, the time during which the unexhausted petition would otherwise have been pending in federal court -- a proceeding that does nothing to promote finality and simply delays the state exhaustion process -- is not lost.

While it is true that AEDPA permits a federal district court to deny the petition on the merits, rather than dismiss for failure to exhaust, 28 U.S.C. § 2254(b)(2), such a process should not be frequently used because it deprives state courts of the first opportunity to pass on the claim and because commencing the review process in federal court bypasses the informed judgment of the state courts most familiar with the case. In light of the principles of comity, it appears that this section was intended to conform § 2254 to existing rules providing for summary denial of those cases in which the claim is plainly meritless on its face. *See* 28 U.S.C. § 2243; Rule 4, Rules Governing Section 2254 Cases in the United States District Courts (2000). The existence of this option in no way suggests that filing of unexhausted claims speeds up the federal review process or that Congress intended to encourage all petitioners to commence their exhaustion process in federal, rather than state, court.

In addition to the House Report setting forth the general goals of AEDPA, there is some evidence from remarks and testimony during Congress's consideration of AEDPA that the tolling provision was intended to apply to state proceedings only. One such reference is particularly clear: in testimony before the House of Representatives Judiciary Committee, Daniel E. Lungren, then-Attorney General of California, proposed the very scheme that Congress adopted: "one suggested modification to improve [the statute of limitations] would be to begin the clock from the finality of judgment on direct appeal with perhaps a tolling period for *state* collateral review." Revised Crime Bill: Before the House Committee on the Judiciary Subcommittee on

Crime, 104th Cong., (January 19, 1995) (emphasis added). That Congress was aware of the varied nature of state collateral proceedings is also evident from remarks of Sen. Spector during the Senate debate: "[h]abeas corpus proceedings arising from Federal convictions are handled slightly differently than those arising out of State convictions, because in State proceedings, after the highest State court affirms the death penalty on direct review, there may then be additional State-court review called *collateral review on State habeas corpus* before review on Federal habeas corpus." 141 Cong. Rec. § 7803-01 (June 7, 1995) (emphasis added); *see also* 141 Cong. Rec. § 7803-01, § 7825-26 (Sen. Orrin Hatch, June 7, 1995) (appearing to describe a state petition for clemency as a form of collateral review, but distinct from judicial post-conviction review). In contrast to the references to state collateral proceedings, *amici* states are unaware of any indication in the legislative history that suggests Congress was considering tolling the limitations period during *federal* collateral proceedings.

IV. THE EXISTENCE OF A WIDE VARIETY OF COLLATERAL STATE PROCEEDINGS GIVES MEANING TO CONGRESS'S PHRASE "STATE POST-CONVICTION OR OTHER COLLATERAL REVIEW."

Perhaps the greatest shortcoming of the court of appeals' reasoning was its assumption that there can be no meaningful distinction between the phrases "post-conviction . . . review" and "collateral review." *See Walker v. Artuz*, 208 F.3d at 360 ("Because 'post-conviction review' is a broad term that seems to encompass all review a prisoner seeks after conviction, we can see no reason why Congress should have believed that there were 'other' forms of 'collateral review' that did not come within the scope of 'post-conviction review.'"). It was this assumption that caused the lower court to reject the most natural

and plain reading of § 2244(d)(2) and, in effect, re-write it to comprise "federal" collateral review. The existence of a wide variety of collateral state proceedings, not all of which may be considered or uniformly described as "post-conviction," however, makes it entirely reasonable for Congress to have used this broad terminology to ensure that *all* state collateral remedies, whatever their local terminology, and whether or not they followed a "conviction," were encompassed within AEDPA's tolling provision.

The phrase "post-conviction . . . review" has no application to state review of non-criminal forms of custody, such as civil commitments, and in some states it is a statutory term that, without the clarifying phrase "or other collateral review," could have led to confusion about Congress's intention to include all collateral remedies, regardless of their nomenclature. On the other hand, referring first to "post-conviction" remedies made it clear that the commonly-used statutory forms of relief designated "post-conviction" were included in the tolling provision, as well as the collateral remedies that employed older terminology, such as habeas corpus. *See* Lawrence Yackle, *Post-Conviction Remedies* §13 (1981 & Supp. 2000) (describing remedies expressly termed "post-conviction" and others employing different terminology such as habeas corpus); *Williams v. Taylor*, 120 S.Ct. at 1501 (state habeas corpus referred to as "state collateral relief); *Pennsylvania v. Finley*, 481 U.S. 551, 556, 557, 559 (1987) (statutory remedy under Pennsylvania Post Conviction Hearing Act referred to as "post conviction review").

Congress's choice of the broad phrase "other collateral review" obviated any need to catalog the numerous and varied state court remedies. For example, in Massachusetts a prisoner may bring a state civil habeas corpus petition -- a collateral procedure as mentioned by Senator Specter -- to obtain his release from "a lawfully imposed sentence [that] has expired," or when

his claim is based on "grounds distinct from the issues at the indictment, trial, conviction, or sentencing stage." *Stewart, petitioner*, 411 Mass. 566, 568, 583 N.E.2d 854, 856 (1992) (*quoting Averett, petitioner*, 404 Mass. 28, 30-31, 533 N.E.2d 1023, 1024 (1989)). A properly filed state habeas petition would constitute "other collateral review." Still another Massachusetts example of "other collateral review" would be the "gatekeeper" procedure under Mass. Gen. Laws ch. 278, § 33E, utilized to seek an appeal from the denial of a motion for new trial in a first degree murder case. *See Phoenix v. Matesanz*, 189 F.3d 23, 26 (1st Cir. 1999); *Dickerson v. Latessa*, 872 F.2d 1116, 1117-1118 (1st Cir. 1989). In both instances, the means to further state review is actually filed as a separate action collateral to the underlying criminal case and separate from the "State post-conviction" remedy of a motion for new trial.

The lower court's reasoning also fails to recognize the historical context applicable to collateral attacks on state convictions and sentences in state courts. In 1955 a Uniform Act dealing with state court collateral attacks by state prisoners against their sentences and convictions was endorsed by the National Conference of Commissioners on Uniform Laws in that organization's ongoing effort to standardize state practice among the States. A limited number of states adopted this Act, but in 1966 the Uniform Act was significantly revised to take into account a broad range of pronouncements of the Supreme Court. Again, a number of states adopted the new act. In *Case v. Nebraska*, 381 U.S. 336, 337 (1965) (Clark, J., concurring) and *id.* at 340 (Brennan, J., concurring), two justices expressed their opinions that due process required a post-conviction remedy. This in turn led many states to adopt the Uniform Postconviction Procedure Act. *See generally* Donald E. Wilkes, *State Post-Conviction Remedies and Relief* 67-117 (1996).

While the enactment of the Uniform Postconviction Procedure Act by various states was intended to regularize collateral proceedings attacking a conviction or sentence, and thus provide a safe harbor from federal habeas attack on the procedural mechanism employed by any given state, the Act is clear that it was in no way intended to usurp the primary role to be accorded the trial and direct appeal process. *See, e.g.*, Iowa Code §§ 822.2 and 822.8. Prior to enactment of this new statute-based form of collateral action known as "postconviction relief," there simply was no comprehensive system in many states for a defendant to collaterally attack a criminal conviction by claiming that a conviction was obtained or a sentence was imposed in violation of constitutional rights. *See, e.g., State v. Mulqueen*, 188 N.W.2d 360, 362 (Iowa 1971) ("prior to enactment of [Chapter 822], postconviction relief in Iowa was confined to a judicially expanded concept of habeas corpus").

A post-conviction relief action, or "PCR" as it is commonly known in many states, is essentially a special name for a hybridized form of statute-based collateral attack on a conviction or sentence filed by a state prisoner in a state trial court after a direct appeal. A statute-based PCR incorporates key elements of two common law perogative writs -- habeas corpus (you have the body) actions and coram nobis (before us) proceedings -- in an attempt to codify collateral attacks on state court convictions and sentences. In a traditional habeas corpus action, one court was asked to overturn the conduct or jurisdiction of the convicting court. Coram nobis, by contrast, was more akin to a motion to reconsider, with the original trial court re-examining its conduct or the facts.

Because not all states have enacted some variation of the Uniform Postconviction Procedure Act, it makes perfect sense that Congress, in recognition of the wide variance in collateral actions made available to habeas petitioners among the various

states, would be careful to acknowledge the diversity inherent in our federal system.

V. IF THE COURT REACHES THE ISSUE, IT SHOULD HOLD THAT AEDPA'S STATUTE OF LIMITATIONS IS NOT SUBJECT TO EQUITABLE TOLLING.

Where Congress expressly provided in AEDPA for tolling of the statute of limitations under specified circumstances, and where it included further equitable provisions delaying the commencement of the limitations period, its inclusion of these express provisions make it plain that Congress did not intend equitable tolling to apply to AEDPA's statute of limitations.

As this Court has recently stated, "[e]quitable tolling is not permissible where it is inconsistent with the text of the relevant statute." *United States v. Beggerly*, 524 U.S. 38, 48 (1998). Although Congress is presumed to be aware of the general application of equitable tolling principles to statutory filing deadlines, *id.* at 679; *United States v. Locke*, 471 U.S. 84, 94 n.10 (1985)), and for this reason there is "a 'rebuttable presumption' that equitable tolling applies to a given statute," *id.* at 679 (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990)), that presumption is overcome where there is "good reason to believe that Congress did *not* want the equitable tolling doctrine to apply." *Id.* at 679 (quoting *United States v. Brockamp*, 519 U.S. 347, 350 (1997) (emphasis in original)). This is the case here.

In enacting this new statute of limitations under AEDPA, Congress explicitly delineated both the events that trigger the running of the statute, 28 U.S.C. § 2244(d)(1), and the circumstances under which the statute may be tolled, 28 U.S.C. § 2244(d)(2). Moreover, both the statute itself and its legislative

history reveal that a central purpose of the AEDPA amendments was to encourage the timely disposition of Federal habeas corpus petitions. *See Fisher v. Johnson*, 174 F.3d 710, 713 & n.10 (5th Cir. 1999) (statute of limitations reflects legislative purpose to curb abuse of the writ and "speed up the habeas process"); *Sperling v. White*, 30 F.Supp.2d 1246, 1251, 1253 (C.D.Cal. 1998) (noting remarks by sponsor Sen. Orrin Hatch to the effect that "Act's purpose was to set strict time limits in habeas cases, reduce delay, and ensure finality"); *cf. Felker v. Turpin*, 518 U.S. 651, 664 (1996) (restrictions on successive petitions restrict abuse of writ); *Williams v. Taylor*, 120 S.Ct. 1479, 1523 (2000) (new standard of review under AEDPA "places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court").

The same purposes are made clear in the House of Representatives Conference Report. *See* H.R. Conf. Rep. No. 104-518, at 11 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944 (noting AEDPA amendments intended to "curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases," as well as to require exhaustion of state remedies and deference to state court decisions meeting new standard).

That AEDPA specifically delineates the limited circumstances in which the one-year limitations period may be tolled, as well as providing in detail for the events that trigger the running of the statute, provides more than "good reason to believe" Congress did *not* intend that other, equitable considerations would toll the running of the statute. *See Giles v. United States*, 6 F.Supp.2d 648, 650 (E.D.Mich. 1998) ("the detail of § 2255 . . . indicates that Congress did not intend to permit courts to read other unmentioned and open-ended equitable exceptions into the statute), *aff'd*, 2000 WL 1720730

(Nov. 8, 2000); *United States v. Beggerly*, 524 U.S. 38, 48 (1998) (equitable tolling inconsistent with text of Quiet Title Act, which already allowed for equitable tolling until plaintiff knew or should have known of action); *United States v. Brockamp*, 519 U.S. 347, 350-53 (1997) (highly detailed and technical statute of limitations for tax refund claim "cannot easily be read as containing implicit exceptions"); *cf. United States v. Reccko*, 151 F.3d 29, 34 (1st Cir. 1998) (applying maxim *expressio unius est exclusio alterius* in concluding that the commission did not intend exception in sentencing guidelines to be expanded beyond its terms).

This conclusion is strengthened by AEDPA's core purposes to narrow the habeas remedy and ensure that habeas corpus petitions reach finality without excessive delay. These purposes are in sharp contrast with those described in *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 426-36 (1965) (interpreting Congressional intent to protect plaintiffs by allowing tolling under Federal Employers' Liability Act during pendency of suit incorrectly filed in state, rather than Federal court). Here, in contrast, the unequivocal legislative history indicating an intent to shorten and restrict the time period for habeas relief, together with the detailed provisions of § 2244(d) making no reference to tolling based on equitable considerations, demonstrate that Congress did *not* want the equitable tolling doctrine to apply. The need for finality on the part of the public, victims of crime, and their families in the face of extremely long delays in the court system adds "special importance" to the narrow interpretation of the statute of limitations under AEDPA. *See Beggerly*, 524 U.S. at 48 (equitable tolling inappropriate where it "would throw a cloud of uncertainty" over the rights of landowners).

Although at least eight circuit courts of appeal have addressed this issue and concluded that equitable tolling applies to AEDPA's statute of limitations, the reasoning of those cases is

unpersuasive. In general, the cases address the issue not as one of statutory interpretation or Congressional intent in accord with the Supreme Court's analysis in *Beggerly* and *Brockamp*, but as a narrow question of jurisdiction. Rather than considering whether Congress intended that equitable tolling apply, the cases simply ask whether the limitations provision is a statute of limitations or, instead, provides a jurisdictional bar. Reaching the obvious conclusion that no jurisdictional bar is imposed, the cases then declare that equitable tolling applies, in most cases without further addressing Congressional intent. *See Smith v. McGinnis*, 208 F.3d 13, 17-18 (2d Cir. 2000) (relying on jurisdiction), *cert. denied*, 121 S.Ct. 104 (2000); *Miller v. New Jersey State Dept. of Corrections*, 145 F.3d 616, 617-19 (3d Cir. 1998) (jurisdiction); *Harris v. Hutchinson*, 209 F.3d 325, 328-30 (4th Cir. 2000) (addressing both jurisdiction and statutory interpretation); *Davis v. Johnson*, 158 F.3d 806, 810 (5th Cir. 1998) (jurisdiction), *cert. denied*, 119 S.Ct. 1474 (1999); *United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000) (adopting equitable tolling under § 2255, but citing *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999), in which the court raised the question of whether "room remains for importing the judge-made doctrine of equitable tolling" in light of AEDPA's express tolling provisions), *cert. denied*, 121 S.Ct. 188 (2000); *Calderon v. United States Dist. Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997) (discussing jurisdiction and legislative history), *cert. denied*, 522 U.S. 1061, 1099 (1998), *overruled on other grounds by Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530, 540 (9th Cir. 1998); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir.) (adopting reasoning of *Calderon*), *cert. denied*, 525 U.S. 891 (1998); *Sandvik v. United States*, 177 F.3d 1269, 1271-72 (11th Cir. 1999) (discussing jurisdiction and legislative history in context of §2255); *cf. Moore v. United States*, 173 F.3d 1131, 1134 (8th Cir. 1999) (citing with approval cases adopting equitable tolling based on jurisdiction argument; holding that Fed. R. Civ. P. 6(a) applies to calculation of the starting date of the

running of the statute); *United States v. Cicero*, 214 F.3d 199, 202-203 (D.C. Cir. 2000) (noting majority and minority views on tolling; question not reached as petitioner not entitled to tolling in any event).

Jurisdiction, however, is the wrong question. While it is perfectly true that a jurisdictional bar (as is created by, for instance, missing the deadline for filing a notice of appeal) precludes a court from enlarging the time limit in question, a jurisdictional bar is by no means the only basis for precluding enlargement of a statutory time limit. Even assuming, *arguendo*, that AEDPA's statute of limitations does not impose a *jurisdictional* bar, adopting a judicially-created doctrine of equitable tolling may nevertheless be foreclosed, as here, by traditional principles of statutory construction and legislative intent. *See Beggerly*, 524 U.S. at 48; *Brockamp*, 519 U.S. at 350.

For all these reasons, if the Court reaches the issue in this case, it should hold that Congress did not intend equitable tolling to be applied to AEDPA's statute of limitations.

VI. SIMILARLY, IF THE COURT REACHES THE ISSUE, IT SHOULD HOLD THAT FEDERAL HABEAS PETITIONS MAY NOT BE STAYED PENDING EXHAUSTION IN STATE COURT.

If the Court reaches the issue of a potential stay of federal habeas corpus proceedings while a petitioner returns to state court to exhaust his claims, the Court should hold that such a stay is not permissible under AEDPA.

The exhaustion doctrine of *Rose v. Lundy*, 455 U.S. 509, 522 (1982), does not permit the district court to retain jurisdiction over a federal habeas corpus petition while the prisoner returns to

state court to exhaust his claims. *See Carmichael v. White*, 163 F.3d 1044, 1045 (8th Cir. 1998) (district court has no authority to hold mixed petition in abeyance pending exhaustion); *Victor v. Hopkins*, 90 F.3d 276, 282 (8th Cir. 1996) (same), *cert. denied*, 519 U.S. 1153 (1997); *Sterling v. Scott*, 57 F.3d 451, 454 (5th Cir. 1995), *cert. denied*, 516 U. S. 715 (1996). *But see Calderon v. United States District Court*, 144 F.3d 618, 620 (9th Cir. 1998) (district court did not err in holding petition in abeyance). Only the existence of "truly exceptional circumstances" can justify an exception to this rule. *Carmichael*, 163 F.3d at 1045. To hold otherwise would eviscerate the holding of *Rose v. Lundy*, 455 U.S. at 522, and create an administrative nightmare, impermissibly allowing the petitioner "to use the federal district court as a jurisdictional parking lot." *See Sterling v. Scott*, 57 F.3d 451, 454 (5th Cir. 1995), *cert. denied*, 516 U. S. 715 (1996). Such a result would undermine AEDPA's statute of limitations and encourage the filing of unexhausted federal habeas corpus petitions.

Conclusion

For the foregoing reasons, the *amici* states respectfully urge the Court to reverse the lower-court decision.

Respectfully submitted,

THOMAS F. REILLY
Attorney General of Massachusetts

CATHERINE E. SULLIVAN*
Assistant Attorney General

WILLIAM J. MEADE
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

**Counsel of Record*

January 8, 2001